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Supreme Court Issues Decision In Ricci Case

In a 5-4 decision issued on the last day of the 2008-2009 session, the U.S. Supreme Court ruled in favor of white firefighters (and one Latino firefighter) from New Haven, Connecticut.

New Haven needed to fill some lieutenant and captain positions in its fire department. By charter, they had to follow a merit system. By union agreement, they had to screen applicants with written and oral examinations, with the written exam accounting for 60 percent and the oral exam accounting for 40 percent of the applicant's total score. The City hired Industrial/Organizational Solutions (IOS) to develop and administer the tests. ISO performed job analyses, rode with on-duty officers and interviewed firefighters. They deliberately over-sampled minority firefighters to help keep exam questions from inadvertently favoring white candidates.

Seventy-seven candidates took the lieutenant exam - 43 whites, 19 blacks and 15 Latinos. Thirty-four of them passed - 25 whites, six blacks and three Latinos. The top ten candidates, all eligible for immediate promotion, were white. Forty-one candidates took the captain exam - 25 whites, eight blacks and eight Latinos. Twenty-two of them passed - 16 whites, three blacks and three Latinos. The top nine candidates were eligible for immediate promotion - seven whites and two Latinos.

The City was concerned that under the test results, no African Americans and few Latinos would be eligible for promotion. They were concerned that if they accepted the test results, they could be sued under the disparate impact theory, meaning that their facially neutral test had a disparate impact on members of minority groups. So the City held a series of meetings trying to evaluate whether there were problems with the test. There were concerns that some of the questions were not related to the New Haven fire department and that the test was too heavily weighted on the results of the written test. The City decided not to certify the results of the test, leading the white (and one Latino) applicants to sue, saying the City was discriminating against them on the basis of their race.

The City won at the trial level and at the Court of Appeals level, but lost at the Supreme Court. Justice Kennedy wrote, "Whatever the City's ultimate aim - however well intentioned or benevolent it might have seemed - the City made its employment decision because of race" in violation of Title VII of the Civil Rights Act. He recognized "the tension between eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other." Title VII does not allow employers to rescore a test based on race and according to Justice Kennedy, employers may not "take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion - eligible candidates absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision."

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Supreme Court Decides Grammar Issue

Ignacio Flores-Figueroa is a citizen of Mexico who works in the U.S. In 2001, he gave his employer a false name, false birth date and false Social Security number and a counterfeit alien registration card. The number on his registration card and the SSN he provided did not belong to anyone. In 2006, he gave his employer a new counterfeit Social Security card and a new counterfeit alien registration card. These cards, unlike the ones he had previously given his employer, used his real name. The numbers on his new cards were in fact numbers that had been assigned to other people.

When Flores' employer reported the information on the new cards to Immigration and Customs Enforcement (ICE), ICE discovered the numbers belonged on the cards belonged to others. The government then charged Flores with entering the U.S. without inspection, misusing immigration documents and aggravated identity theft.

Federal criminal law imposes a mandatory consecutive two-year prison sentence for aggravated identity theft for a person convicted of certain other crimes if, during the commission of those other crimes, the offender "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person."

Flores argued that the aggravated identity theft charge had to be dismissed because the government could not prove that he had "knowingly . . . use[d] a means of identification of another person." The government argued that it didn't have to prove Flores knew these numbers had been assigned to another person. In a May, 2009 decision, the Supreme Court sided with Flores.

Justice Breyer wrote that "As a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all of the subsequently listed elements of the crime." He added that "if a bank official says, 'Smith knowingly transferred the funds to his brother's account,' we would normally understand the bank official's statement as telling us that Smith knew the account was his brother's . . . if we say that someone knowingly ate a sandwich with cheese, we normally assume that the person knew both that he was eating a sandwich and that it contained cheese."

The decision was unanimous, with Justices Alito and Scalia writing concurring opinions.

Federal prosecutors had used the threat of mandatory sentences to persuade illegal workers to plead guilty to lesser charges of document fraud. The Obama administration has said that it will shift the focus of immigration enforcement to employers who intentionally hire unauthorized immigrants, according to the New York Times, but will continue to detain illegal immigrants found in workplace raids.

The case is Flores-Figueroa v. Unites States, 2009 WL 1174852 (2009). ♦

Ricci Case (continued from page 1)

Justice Kennedy said that the majority did not "question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. But once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race."

Justice Ginsburg wrote the dissent. She said that it took "decades of persistent effort, advanced by Title VII litigation, to open firefighting posts to members of racial minorities." She said the majority ignored "substantial evidence of multiple flaws in the tests New Haven used" and "failed to acknowledge the better tests used in other cities, which have yielded less racially skewed outcomes." She would have remanded the case to the trial court for further litigation.

The case is Ricci v. DeStafano, 2009 WL 1835138 (U.S. 2009). ♦

Age Discrimination And Mixed Motives

Jack Gross began working for FBL Financial Group, Inc., in 1971. By 2001, he was the claims administration director for the company. In 2002, he was reassigned to the position of claims project coordinator. At the time of his reassignment, FBL transferred many of his old job duties to a new position called claims administration manager. FBL selected Lisa Kneeskern, a woman in her 40s who had previously been supervised by Mr. Gross, for the new position. FBL paid both Mr. Gross and Ms. Kenneskern the same pay, but Mr. Gross considered his new job to be a demotion because Ms. Kneeskern had taken over his old job responsibilities.

Mr. Gross sued and provided evidence that FBL reassigned him at least in part because of his age. FBL said it reassigned him as part of a corporate restructuring and that Mr. Gross's new position better suited his skills.

At trial, the judge told the jury that if it believed that age was a motivating factor in Mr. Gross's transfer, if age "played a part or a role in FBL's decision to demote" him, then it should find for Mr. Gross. If it found by a preponderance of the evidence that FBL would have transferred him regardless of his age, then it should find for FBL. The jury found for Mr. Gross.

FBL challenged these jury instructions on appeal, and in June, the U.S. Supreme Court found in favor of the company. Justice Thomas, writing for the 5-4 majority, wrote that "the ordinary meaning of the ADEA's (Age Discrimination in Employment Act) requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act." Thomas wrote that "It follows, then, that . . . the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action." In other words, it was not up to FBL to prove that it would have taken the same action regardless of Mr. Gross's age. It was up to Mr. Gross to prove that age was the motivating factor, or "but-for cause" in the company's decision.

Justice Stevens, writing the dissent, wrote that Justice Thomas had answered a question not briefed by the parties. He wrote that the "most natural reading of the text [of the ADEA] proscribes adverse employment actions motivated in whole or in part by the age of the employee."

The case is Gross v. FBL Financial Services, Inc., 2009 WL 1685684 (U.S. 2009). ♦

EEOC Alleges Racial Harassment In Workplace

The U.S. Equal Employment Opportunity Commission (EEOC) filed a law suit against Crom Corporation and Crom Equipment Rentals in June, 2009, alleging that the company did nothing to stop racial harassment in its workplace. Crom Corporation and Crom Equipment Rentals sell concrete water tanks and scaffolding and operate throughout Florida and in nine other states.

According to the lawsuit, a white employee at Crom's locked a black co-worker in a shed and then spray-painted the work "jail" on the shed door. The white employee also, according to the lawsuit, put a hangman's noose around the black employee's neck, hung the noose in his work area and threatened to decapitate him. Another black employee saw the noose at the work site and was offended as well.

The lawsuit said that Crom was aware of the harassment but did nothing to stop it. Instead, after the black worker complained about the noose, he was suspended and the white employee was given a higher-paying position. Stuart J. Ishimaru, acting chairman of the EEOC, said, "It is shocking and sobering that such cruelty can still occur at an American workplace. The EEOC will not falter in its quest to put an end to such injustice." The EEOC tried to negotiate a voluntary settlement in this case and when it was unable to, filed the lawsuit.

Lawsuits give only one side of the story. ♦

BHRC Issues Hate Incidents Report

The BHRC has issued its latest yearly report on hate incidents. The current report includes 29 incidents, the same number reported last year.

The hate incidents described in the current report were apparently motivated by a variety of biases. Sixteen seemed to be motivated by bias on the basis of race, eleven on the basis of sexual orientation or gender identity, three on the basis of sex, two on the basis of religion and one on the basis of disability. The total number of biases organized by type exceeds the total number of incidents in the report because some incidents showed evidence of more than one kind of bias.

The hate incidents came in a variety of forms: twelve reports of actual physical harm; seven reports of vandalism; five threats of physical harm and five reports of verbal harassment in the form of name-calling and slurs.

Alcohol appeared to be a factor in eight of the incidents.

The BHRC has been gathering data and issuing reports on hate incidents since 1990. The commission receives reports from the City of Bloomington Police Department, news reports and individuals. People who are victims of hate incidents are urged to report the incident to the police by calling 911 or to the BHRC by calling 349-3429 or e-mailing human.rights@bloomington.in.gov. The BHRC accepts anonymous reports. This year's report can be found online at www.bloomington.in.gov/bhrc. ♦

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